Supreme Court of the United States

OCTOBER TERM, 1902. NOS. --- AND ---

LOUISA V. KIDD, *as Exexutrix, Plaintiff in Error,*

v.

THE STATE OF ALABAMA, *Defendant in Error.*

LOUISA V. KIDD, *Plaintiff in Error,*

v.

THE STATE OF ALABAMA, *Defendant in Error.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Louisa V. Kidd as Executrix of the will of H. B. Tulane, deceased, plaintiff in error in the cause first above entitled, and Louisa V. Kidd (individually), plaintiff in error in the second above entitled cause, depending in this honorable court, involving the same question and by stipulation of counsel to abide by the decision in the first of the above entitled causes, respectfully represents, that in the opinion and decree pronounced at the present term of this court in said causes, she is grieved thereby, and she petitions for a rehearing and reconsideration of said opinions and decrees.

The grounds of this application are:

1. That the Fourteenth Amendment of the Constitution prohibits the taxation against citizens of shares of stock in railroads doing no business in the State or having no property in the State merely because such railroads are not located or doing business in the State, while the shares in such railroads as are located in, or as pay *any* taxes to the State, are exempted from taxation.

2. That the individual shares in corporations and the capital stock and property of a corporation are distinct property rights and subjects of taxation, and that the *venue* of the corporation's domicil cannot change the species of property of individuals in shares, so as to classify property rights therein on that basis for taxation.

3. That shares of individuals in corporations of the like kind belong to one species of property inherently and for purposes of taxation, and that they must be taxed or exempted alike.

LOUISA V. KIDD,
As Executrix and individually, by her attorney,
W. A. GUNTER.

I, William A. Gunter, counsel for the petitioner in the above mentioned cases, and in the foregoing application for a rehearing therein, hereby certify that in my opinion the said petition is well grounded in point of law.

Montgomery, Ala., April 6, 1903.

W. A. GUNTER,
Counsel for Petitioner.

ARGUMENT IN SUPPORT OF THE FOREGOING APPLICATION FOR A REHEARING, BY W. A. GUNTER, ATTORNEY FOR PLAINTIFF IN ERROR.

I.

IT IS NOT COMPETENT FOR A STATE TO EXEMPT FROM TAXATION SHARES OF RAILROADS LOCATED IN THE STATE, AND OF ALL RAILROADS NOT SO LOCATED THAT ARE REQUIRED TO RETURN ANY PROPERTY WHATEVER FOR TAXATION, AND AT THE SAME TIME TO TAX SHARES IN RAILROADS THAT HAPPEN TO PAY NO TAXES TO THE STATE.

We think that the court did not quite consider the case in the view above expressed, but, referring to the case of Sturges v. Carter, 114 U. S., 522, regarded the question as being, whether the State could tax foreign shares, while exempting shares in roads paying taxes upon "all or substantially all, their capital and property."

While we contend, and will endeavor further on to show, that even the latter question should be answered in the negative, it is sufficient in this case to answer that the record presents the first question according to our construction of the case made and submitted.

This apparent misapprehension of the point of the case, and the fact that two of the judges agree with the contention of the appellant, and the great importance of the constitutional question involved, induce us to believe that this appeal will not be considered as a trespass upon the time of the court.

The case of Sturges v. Carter, *supra*, did not involve

the question of the constitutionality under the fourteenth amendment, of a tax levied, but the construction of an exemption claimed under a statute. And the response of the court was simply as to the meaning of the statute involved. The law said:

"No person shall be required to include in his statement (assessment) any share or portion of the capital stock or property of any company or corporation which is required to list or return *its capital and property for taxation in this State*," and: "No person shall be required to list for taxation any certificate of the capital stock of any company *the capital stock of which is taxed in the name of the company*."

Sturges v. Carter, 114 U. S., page 520.

The defendant claimed that his stock, in the Western Union Telegraph Company, was exempt from a general tax law, because the corporation had some property in the State on which it paid taxes, though its capital stock and property at large were not required to be, and were not given in for taxation.

The court said that the exemption only covered stock in corporations in which "all, or substantially all, their capital and property" were taxed by the State, and that as the Western Union only returned, and was only required to return, "a small part of their property for taxation in Ohio," the defendant's shares in that company were not within the terms of the exemption. The Ohio statute was construed in Bradley v. Bauder, 36 Ohio St. 28, and was distinctly held not to apply to cases in which the *capital stock* was not listed for taxation, and thus did not extend to a foreign corporation which could not be required to list its capital stock because situated beyond the State. Citing, Railroad Co. v. Pennsylvania, 15 Wall, 300.

But in the case at bar, the exemption clause is wholly different, applying to every case in which the corporation is required to list *property for taxation*. The statute here, previous to 1896, provides that:

"The shares of the capital stock of any company or corporation which is required to list its property for taxation in this State, shall not be assessed against the shareholders of such company or corporation."

Code of Ala. 1886, § 451.

And by section 494 of same Code, railroads were required to list their property by making return as follows:

"On or before the first of April of each year, the president, secretary or auditor of any railroad whose track or road bed *or any part thereof*, is in this State shall under oath make to the State Auditor a return in writing of the total length and value of such railroad, including the right of way, road bed, side-tracks and main track *in this State*, and specifying the total length and value thereof *in this State* and in each county, city and incorporated town *in this State;* and also of the number and value of the locomotive engines, and passenger, freight platform, construction and other cars of such company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale, or other disposition for a profit by such company to employees or other persons *in this State*, for the year next preceding the return; and such return the Auditor shall lay before the State Board of Assessment at its next meeting thereafter."

And by section 509 of the same Code, it is provided that:

"All property, real or personal, belonging to railroad

companies, which is not required to be returned to the Auditor, must be returned to the tax assessor of the county in which it is taxable, and by him assessed as other property in the county it is returned and assessed."

And by section 453 of the same Code, the subjects and rules of taxation are stated so far as pertinent as follows:

"For the use of this State, and to raise revenue therefor, there is levied an annual tax of 60 cents on each one hundred dollars in value, upon the following property:

Clause 9. The capital stock of all corporations, companies or associations *created* or *existing under any law in force in this State*, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company or association; but when such corporation pay the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed."

Clause 11. "The road-bed, track and other property, real and personal, of railroads."

Clause 13. "All other property, real and personal, not otherwise specified herein."

And by the Code of 1896, which applies to the taxes for the year 1897, the exemption is embodied in the tax law by exception.

Section 3911 is as follows:

"For the use of this State, and to raise revenue therefor, there is levied an annual tax of 55 cents on each one hundred dollars in value, upon the following property."

Clause 9 of this section is:

"Every share of any corporation organized under the laws of this State or any other State of the United States (*other than railroads*) to be assessed and collected, etc."

Sec. 12. "The road-bed, track and other property, real and personal of railroads."

Sec. 14. "All other property, real and personal, not otherwise specified herein."

Now, under neither Code is the capital stock of foreign railroads pretended to be taxed against the railroad. It is only the capital stock of corporations created by, or existing under the laws of Alabama, that are taxed under the Code of 1886, that is only of domestic corporations, and as to them, the value of the property in which the capital is invested, and is subject to taxation, is deducted. But all railroads, under both laws, having any property in the State, are required to *list their property* (of course, meaning and saying, such as is in the State) *for taxation*, and, therefore, the exemption from taxation applies to all shares of railroads having *any* property whatever in the State. Such are the express words of the statute. Shares in railroads that have to list property for taxation in the State, are exempt, and therefore the payment of ten dollars tax on property by a railroad, exempts all of its stock from taxation, while stock in other railroads wholly without the State is taxed.

To test more clearly the operation of the law under discussion, we may leave out of consideration the case of shares in domestic railroads, for the present, and view only the case of shares in foreign corporations which have some property in the State, and those which have none.

Railroads having some property, no matter how little, in the State, have to list their property for taxation; the owners of shares in such are exempt from taxation, by the express words of the statute.

Railroads having no property in the State, do not have to list their property for taxation; the owners of shares in such are taxed upon the value of such shares, while the citizen owning the same class and kind of property in a parallel road having half a mile of track in the State is exempt.

Is this, or can this be "substantial justice?" The definition of what is justice in such cases is found in the Constitution of the State of Alabama, construed by its own court, in State Bank v. Board of Revenue, 91 Ala., 223, which is in exact accord with the requirements of the fourteenth amendment of the Constitution of the United States, viz: that taxes for revenue, levied on *values*, must be in the exact proportion of such values, and that property inherently belonging to the same class cannot be taxed differently.

The first question is, do shares in two railroads of equal capital, of equal length, and running parallel except for half a mile at the eastern end of one, and the western end of the other, belong to the same class of moneyed capital? It seems plain enough that no one could assert that there is, or can be, any inherent or

natural difference between the property qualities in the shares of two such roads as could put them into different classes of moneyed capital, if the only difference in the world between the two cases, is, as we may suppose, that one road runs half a mile across an artificial line, into a different taxing jurisdiction, while the other, though of equal length, stops at the line.

If they belong to the same class of moneyed capital naturally, can they be classed separately for purposes of taxation, so as to exempt one and tax the other, on account of the sole distinction between them that in one case the corporation's road extends a short distance within the State, while in the other it stops at the line?

This brings up first, the question on what distinctions may classes for taxation of values for revenue be founded? And second, what is the essential nature of a chose in action or share in the capital stock of a rail road?

The answer to each of these questions is plain enough to be "common place," nevertheless they are directly involved in this enquiry.

The fourteenth amendment would be worthless if mere classification would authorize discrimination in taxation, since there is no limit to classification. If mere classification would suffice, it would be an answer to the most arbitrary discriminations to show that they were the results of classification, and that there was no discrimination as to persons or things of the same class. Therefore it is held that, "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws;" and that, "The classification must proceed upon a substantial dif-

ference which has a reasonable relation to the object sought to be accomplished by the statute;" and that it must bear "a reasonable and just relation to the act in respect to which the classification is proposed;" and can never be without such basis.

State v. Loomis, 115 Mo., 307;
Atchison v. Mathews, 174 U. S., 96;
Gulf C. & S. F. R. Co., v. Ellis, 165 U. S., 150;
State Bank v. Board of Revenue, 91 Ala., 223.

Does the single fact then, that one railroad extends fifty feet or fifty miles in the State of Alabama furnish a distinction for classing the stock of such road differently for taxation on values "for revenue only," from the stock of a road that stops at the state line? Why should such an accident cause or authorize any such discrimination? It does not alter the inherent quality of the property right of the owner of the share from what it was before the railroad crossed the line of the State.

What is the inherent quality and effect of the crossing of the State line? Of course the State might impose terms for the privilege of coming into its territory, but that was not done, and, besides, the exemption of shares from taxation would be no exaction from the corporation, and is placed on no such ground.

It is distinctly asserted in the opinion of the Alabama Court in this case (28 So., 482) that the discrimination and distinction rests upon the idea that the tax on the property of the railroad within the State would be a tax on the shares of that road, and thus authorize the exemption as to the shares in that case.

And the opinion of this court must rest on the same idea or it must, it seems, abandon the rule that the

basis of the classification for taxation must have reference to some inherent difference which bears the same relation to the purpose of the statute. The purpose of the statute being for revenue only, and levied on values and the shares belonging to the same moneyed class, the mere fact that one of the corporations, in which the stock is held, extends across an artificial line, makes no difference *per se* in the character or class of the share of its stock. Any attempt at a distinction as to classes founded on that fact alone must be, as is said in State Bank v. Board of Revenue, 91 Ala., *supra*, futile. The distinction then must be supported, if at all, upon the idea suggested by the Supreme Court of Alabama, that the tax on the property of the road extending into the State was a tax on the shares, and justified the classification of shares into two kinds, one in roads having some property in the State, the other in roads having no property in the State, and exempting the first and taxing the second.

But the position is untenable, and if sound, not decisive. This court has repeatedly decided, and the Supreme Court of Alabama has decided in this case, and it is generally recognized as the law, that shares in a corporation and the capital stock of the corporation are distinct and separate subjects of taxations; the former belonging to the individual and having his domicil, the latter to the corporation; and that each may be taxed without its being double taxation. It is distinctly held that the latter cannot be taxed against corporations not located, though doing business in the State, because the situs of such property is attached to the domicil of the corporation, and thus beyond its jurisdiction. But at the same time it is held that, "investments in stocks in foreign companies, owned by residents here, *being property within the State*," are subject to taxation. "The capi-

tal of a corporation, whatever invested in, and the individual shares of stock, are distinct species of property. —Farrington v. Tennessee, 95 U. S., 679. The owner of a share of stock owns no part of the capital of the company.—Watson v. Spratley, 10 Exch., 236. The corporation is its sole owner. . . ."

Bradley v. Bauder, 36 Ohio St., 28–35.

"It may be conceded that generally the capital or capital stock of a corporation is its property.—Bank Tax Case, 2 Wall., 200; National Bank v. Commonwealth, 9 Wall., 353.

But the shares held by the stockholders are distinct from the capital stock of the corporation, and the taxation of both is not necessarily double taxation."

Sturges v. Carter, 114 U. S., 521;
Farrington v. Tenn., 95 U. S., 679;
Dewing v. Perdicaries, 96 U. S., 193;
Bradley v. Bauder, 36 Ohio St., 28.

"It is well settled by the decisions of this court that the property of shareholders in their shares and the property of corporations in its capital stock are distinct property interests, and that both may be taxed."

Van Allen v. Assessors, 3 Wall., 573;
The Delaware R. R. Tax, 18 Wall., 206;
Gibbons v. Mahon, 136 U. S., 549.

And *a fortiori* the tangible real and personal property of the corporation is separate and distinct from the individual ownership of shares. This being so, and the situs of the share following the domicil of the owner and the situs of the capital stock attaching to the domicil of the corporation, Bradley v. Bauder, 36 Ohio State, 28, it follows, that the excuse or justification for taxing share B in a road listing no property in the State, and exempt-

ing share A in a road listing some property in the State, which shares are of the same moneyed class of investment, having the same situs and the same value, is, that share A is commercially related more or less closely to the railroad C, which has some property in the State, and pays a portion of its tax levies.

This, of course, is a strong statement, but is it not strictly justified by the holding in this case? By the law under discussion a citizen owning shares in a railroad located entirely in Georgia is required to pay the regular tax on every share in the corporation if he is owner, and of course the amount might be anything supposable, while a citizen owning a like amount in value of shares of another Georgia railroad extending fifty yards in the State of Alabama, and paying fifty dollars tax thereon, is wholly exempt from taxation!

If the capital stock and property of a corporation is a distinct and separate ownership and property from that of shares owned by an individual, and if the situs of any portion of the corporate property in the State justifies the exemption of shares of individuals therein from taxation, while other shares are taxed, what prevents, under this rule, the taxing power from classifying for exemption and taxation on any basis whatever catching its fancy, though wholly disconnected from any distinction "in the nature of things and irrespective of the definitive legislation," putting the subjects in different classes. We see nothing in such case to limit the power of classification to inflict injustice. On the other hand, if capital stock and corporate property are the same as the individual property in shares, the latter are beyond the power of taxation so far as shares in foreign corporations are concerned, since the capital stock adheres to the domicil of the corporation.

Bradley v. Bander, 36 Ohio St., 28;
R. R. Co. v. Penn., 15 Wall., 300;
7 Notes U. S. Reps., 892.

We accept the proposition that the situs of shares is with the domicil of the owner in domestic or foreign corporations, whether it is by fiction or not in either case, or both cases, is wholly immaterial *for all purposes* of taxation. In all cases though the property is called a chose in action, in its essential nature it has reference to tangible personal property, since every chose or thing in action by being reduced to possession, merely loses its distinction as to being out of possession without any change of its essential nature. So far as the right of taxation is concerned, the chose, whether *in possession* or *in action* is the same, and each is taxable at its situs precisely as if it were bodily present thereat; and, as it would clearly be invidious and unjust to look to the mere previous history of tangible property involving whence and how it came there, to classify it for taxation, on the mere idea that the taxing power may look behind net value, so it cannot be less offensive to the ideas of justice prescribed by the Constitution, to classify, for discriminating taxation, choses in action *merely on the basis of their history*, on the idea that the taxing power may look behind net values. Whether or not a share of stock of a given net or market value present at a given situs for taxation, came thither by one mode or another, or was derived one way or another, or relates to a railroad built with rails of one weight or another, or a road wholly in Georgia or one partly in Georgia and partly in Alabama, are all questions which go behind its net value, and no doubt they may be of some interest in some investigations, bnt they touch not any questions justifying classification of shares differing merely in these respects so as to tax some and not others.

But we submit that the effect of the law under the discussion makes just such distinctions and no others.

There is an undoubted right to look behind net values for purposes of classification for taxation, that is, the taxing power can and should know everything pertinent to the subject of taxation, but in looking back and in using its knowledge, it can only notice for classification for taxation such matters as show that "in the nature of things, and irrespective of the (proposed) definitive legislation, they (the things proposed to be classified) belong to different classes."

Pacific Express Co. v. Seibert, 142 U. S., 339.

And such we insist cannot be settled to be the case as to shares that differ only in the fact that one has relation to a road wholly without the State while the other relates to a road extending into the State, or which has *some* property in the State. That must be merely a matter of history, genealogy or pedigree, no more affecting the inherent quality of the things present for taxation than would the most idle question wholly disconnected with the articles under investigation for classification.

If the shares are wholly distinct subjects and property interests from the corporate capital stock and property, then the fact that one of the corporations has *some* property in the State while the other has none, is wholly beside the point, whether the one share may be taxed, and the other exempted, when the shares are alike in every other respect.

In such case we submit that substantial constitutional justice is not meted out by a law that makes the one share support the government while the other is exempt.

On the other hand, if shares and capital stock are identical, so that a tax on one is a tax on the other, then

shares must have the situs of the corporate domicil, which would make the tax in this case unconstitutional.

But it is conceded that shares may be taxed at the domicil of the owner, because they are separate and distinct from corporate property and stock. The claiming and allowance of this, however, at once renders untenable the position, that a tax on *some* property of a corporation (that is on different property of a different person) will justify for taxation the diverse classification of other property of other owners, belonging, however, as to every *essential feature*, to the identical class of moneyed capital; one, as taxable; the other, as exempt.

II.

IT WOULD NOT BE COMPETENT FOR THE TAXING POWER TO EXEMPT SHARES IN DOMESTIC CORPORATIONS PAYING TAXES ON ALL THEIR CAPITAL STOCK, AND TO TAX SHARES IN FOREIGN CORPORATIONS HAVING NO PROPERTY IN THE STATE.

To deduce the principle involved in this proposition let us take an illustration.

Take a corporation situated in county A of Alabama, and take two citizens, B. and C., residing in a different county from that in which the corporation has its domicil. The capital stock of the corporation is a million of dollars, it is assessed on it and pays the taxes thereon at its domicil. Its stock is par and is offered for sale on the exchange.

The stock of a foreign corporation of same amount and value, is also offered for sale on the same exchange. Now the two citizens B and C each have $1,000,000.00 on deposit at their domicil to invest, and B buys the stock of the domestic corporation, while C invests in the stock of the foreign corporation, and settle down for

life to enjoy their respective dividends, which we may suppose to be six per centum.

The corporations are of the same character in all respects except location, one being east and the other west of the State line. The law we will suppose to say:

"Corporations located in this State are taxed fifty cents on the hundred dollars of their capital stock less the value of property, part of its capital stock, otherwise taxed.

Shares in foreign corporations are taxed fifty cents on the hundred dollars of their value; shares in domestic corporations are exempt."

Before the investment of B and C in shares, they paid equally, we will say, all the expenses of their city or county, and they invested the same amounts in the same kind of moneyed capital as above supposed.

After this investment the officials insist that C shall pay the county expenses and a large State tax on his investment, while B pays not a dollar, yet receives a like income with C from his investment; and the Supreme Court of Alabama holds that the contention is sound and meets the ends of "substantial justice."

The question is, can this court approve such a ruling, or, rather, will it adhere to such a decision?

Let us leave sentiment out of the way, though it is difficult to assent to the proposition that of two citizens of the same town, of the same income from the same class of property, one should, under any circumstances, be made to bear all the public burdens, and the other none. The simple question is, does the law of the land tolerate such a condition?

Now, the capital stock of a corporation is the same as the shares, or it is not. If it is the same, then it is

perfectly right that B should be exempt from taxes *at his residence*, because he has no property there, all of it being situated in the County A, at the domicil of the corporation.

But to get B's property away from his residence, the principle is established that takes C's property out of the State, by attaching it to the domicil of the corporation in whose stock he has invested. It is evident on this theory, that while B may be exempt, C cannot be taxed, for the taxing power does not extend to property not in fact or by fiction, within the jurisdiction.

Railroad Co. v. Pennsylvania, 15 Wall. 300;
7 Notes U. S. Reps. 892.

Now, suppose that shares and capital stock are different property rights, and thus different subjects of taxation. In such case, while C can make no objection to the law taxing his shares, on the idea that his property is not at his domicil, he can say that B has as much of the identical kind of property present at his residence yielding the same income, and he is under the like duty to pay taxes, and that the two properties must be taxed alike, or not at all. And we do not see that any answer can be made to this suggestion, if C is entitled to the equal protection of the law with B, which no one will deny.

It makes no difference which dilemma is taken. By the one, the State has no right at all to tax C's shares; by the other it has no right to tax C's shares and exempt B's shares.

As this court is thoroughly committed to the theory that individual ownership of shares is distinct from corporate ownership of stock and property, Bradley v. The People, 4 Wall., 459; Van Allen v. The Assessors,

3 Wall., 593; we will further briefly consider the propriety, under that idea, of taxing the shares of B and C alike, or not at all.

The case for consideratton is that of two citizens possessed of the same amount and value of the same kind of moneyed capital (shares) present at the same situs, with no difference in the world, except that one holds in a domestic and the other in a foreign corporation.

This court says in this case:

"When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock it may take into account that the property and franchise of the corporation are untaxed on the same ground that it might do the same thing with a domestic corporation. There is no rule that the State cannot look behind the present net values of different stocks. See American Refining Co. v. Louisiana, 179 U. S., 89."

We respectfully submit that in the above quotation is the fault of the decision.

In the first place, we do not come to consider *corporations*, formed at home or abroad, when the question is one of the right to tax, and the quantum of the tax to be put on, the *separate property* of a citizen. The class of the property being known, by looking at, and knowing and appreciating every inherent distinction authorizing discriminations by classes for taxation, the only question we submit before the Legislature is, whether such *class* shall be taxed, and if yea, at what rate? And the Su-

preme Court of Alabama, by a very able judge, stated in State Bank v. Board of Revenue, 91 Ala., p. 223, the considerations which must govern:

"What we do decide is, that whenever the Legislature levies a tax on property, the rate must be *in exact proportion to the value of such property;* and that if a tax is imposed on any species of property, *all property belonging to that species of property* must be taxed at the same rate. We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

Now if the shares belong to the same moneyed class and species of property inherently and by every natural attribute, and are present for taxation at the same place, and are of the same market value, and if they are separate and distinct property and subjects of taxation from corporate property, we do not see how there is any question of antecedents or history, or as to the present condition or situs of the corporation that can enter into, and influence classification for taxation on values for revenue only.

The share being separate property, belonging to a different person, having as it may a different domicil, and being taxable irrespective of corporate investments, all of which may be in non-taxable securities, it seems that all reference to the corporation is wholly irrelevant, on any question of taxing shares.

In the next place, it appears to be a novel and unsound proposition, that in taxing values of an *individual's* property, the taxing power may take into consideration that there is *other property not belonging to this individual*

which is beyond the jurisdiction and which, therefore, cannot be taxed. We know of no case or principle authorizing any such consideration for the purpose of inducing discrimination against properties of "the same species." The taxing power can only look to the persons and property under its jurisdiction and subject to its power, and as the citizen who invests in the shares of foreign corporations retains his property after investment as much within the power and jurisdiction of the State as was the case before investment, it seems that the fact that he has thus invested in foreign shares, so far as his rights and duties and those of the State are concerned as to taxation, is wholly irrelevant on any question of discrimination.

The Court further says that in this looking back behind net values in the case of shares in foreign corporations, if the Legislature concludes to tax shares, "it may take into account that the property and franchise of the corporation are untaxed on the same ground that it may do the same thing with a domestic corporation." And it cites as authority the case of American Refining Co. v. Louisiana, 179 U. S., 89. The case cited is a very proper decision, but it gives no color to the proposition for which it is cited. The tax in that case was not on values, but on a franchise or business, and the question was simply whether a sugar planter was a manufacturer or in the business of refining sugar, because he prepared his own product for market. The court held that his refining was a mere *incident* to his business of growing cane, and that he did not come in the definitive classification of "Refiners," all of this though, on account of natural and inherent differences between his case and that of those refining the production of others, precisely as in the case of Seibert, in 142 U. S., 339, the Railroad Company using its own transportation on its

own road was not an Express Company in the meaning of the tax law. Of course, we admit that the taxing power may be moved to exempt property from taxation from any motive. But this is not a case of exemption but of taxation. And we must admit that the taxing power may be legitimately moved by any consideration or motive whatever, to put a tax on property and persons within its jurisdiction. But this is not a case in which is called in question the power to tax.

The simple question is, whether in exercising an acknowledged right to tax a given *species* of property on values, the power must be exercised justly, that is, constitutionally, that is, in the language of the Supreme Court of Alabama, "if the tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate." And, of course, the fact that a corporation with its property is in one jurisdiction or another has nothing to do with altering the species of property of the shares of individuals therein, under the settled theory of this court that corporate property and capital stock and individual ownership of shares are separate and distinct property rights.

The court further says, referring to taxing shares in foreign roads while exempting shares in domestic roads and such foreign roads as pay some taxes to the State on property therein:

"The State of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purposes of its laws the property is not taxed at all. It is said that the State may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The State does nothing of the kind. It adheres throughout to the

fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the State's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a State, and the property of the corporation outside."

This position of the court, or rather the conclusion drawn from the statement, it is respectfully submitted, is indefensible.

It is admitted, for it is the basis of the contention in this case, that shares may be within the State while the capital stock and corporate property are foreign. But this is because, as has been repeatedly decided by this court, the shares are separate and distinct species of property and subjects of taxation from capital stock and other corporate property, and that they adhere to the domicil of the owner, while the capital stock has the domicil of the corporation, and the other corporate property which has a tangible form has its situs for taxation where it is actually situated. Therefore, it follows that when a citizen sells his real estate and invests the proceeds in foreign stocks, his investment is just as much within the jurisdiction and power of the State as previous to the sale of the land. While his investment was in land, he had the guarantee of the State and Federal Constitution that his land would be taxed only and solely according to its *actual value* irrespective entirely of the reason or cause of such value, and that the land of other citizens should be taxed on their value, irrespective of the causes of such value, according to the same ratio. To say, then, that the taxing power may exempt the one

and tax the other, or discriminate even partially between two owners of lands of equal values, because the value of one results from property or causes beyond the jurisdiction of the State, is wholly beyond our conception.

To illustrate it in a manner which is allowable, let us suppose two tracts of land in a state in which the value depends entirely upon irrigation. One tract is irrigated by water works within the jurisdiction of the State, paying taxes on its value.

The other tract is of the same value, and is in the same county, but is irrigated from the "White" instead of the "Blue Nile," and by means of water works located beyond the State line.

Here, now, is a perfect illustration of the principle established by the decision in this case. Under the holding of the court, the taxing power could exempt the land of the citizen watered from the "Blue Nile" because the water works (or "property") giving value to the land are taxed. And it could tax the land watered from the "White Nile" because the water-works or "property" giving it value are beyond the jurisdiction and in New Mexico instead of Arizona, which we will suppose to be the venue of the taxing power.

Surely the court could not intend such a result, and yet is it not the precise decision made in this case?

After classification, it is values only that the State can look at when taxing property *as such*. We are not dealing with the case of franchises or that of police regulations. When property is proposed to be taxed, it is of course to be classed, so as to receive its ratio of the proposed public burden of taxation.

Classification, however, is made, and must be made,

by reference to inherent qualities of the things classified, putting them into different lists or kinds of property, as in the cases of Seibert in 142 U. S., and American Refining Co. in 179 U. S. The classification being made, which in this case must be the same as to two shares of stocks in railroads which themselves differ only in the respect that one extends fifty feet within the taxing district, while the other stops at the line, values are next considered, and these are merely the "vendible" qualities of the article, which the great public fixes on considering and viewing everything calculated to add to, or detract from worth as an investment and article of useful property.

And it appears quite beyond reason to say that two articles of the same class of moneyed capital of equal value, in the same situs for taxation and the result of a mere change of investment of the same amount of other property into the new form, could be classified differently for exemption and taxation because the value of the one results from other property, belonging to other persons, situated within the taxing district, while the cause of value to the other is from other property belonging to other persons beyond the taxing district.

The Legislature, it appears, has nothing to do with the causation, or the *venue* of the causation, of values when it comes to make discriminating laws. And there is, it seems, not the slightest natural equity in the idea suggested that there should be any discrimination in such cases, even if the constitutional objections left the matter to a mere wise discretion of the State. The taxing power deals only with its own anatomy. The property and persons within its limits constitute its body and resources. Its wants must be supplied by its own energies; by checking on its own capital. A and B are

atoms of its body, though they are citizens having a qualified separate existence. It cannot be denied that, if there is such a thing as natural equity, the two citizens receiving equal benefits from the general government, and having equal and like values of property within its jurisdiction, should bear equally the public burdens.

Causation of values, whatever they may be, leave a *residuum*, and this residuum only, is the subject of the taxation of *shares*. And if the two citizens have a like residuum of the same class of moneyed capital, what equity can there be to discriminate between them on account of the causation of value in either case.

The case of Travelers Ins. Co. v. Connecticut, 185 U. S., 364, in principle, seems to settle this case. It is true in that case the tax was levied on the shares of a non-resident in a domestic corporation, on the idea that shares may by legislation be attached for taxation to the domicil of the corporation. But it makes no difference as to the law of discrimination whether the owner is a citizen or not of the taxing state, or the share in a domestic or foreign corporation. For the tax in each case is levied on property present in the taxing jurisdiction, and the "apparent discrimination" in the case of the Travellers' Insurance Co., *supra*, was founded on the non-residence of the *owner*, while in the case at bar the "alleged discrimination" is founded on the non-residence of a *third party*, to-wit: the corporation issuing the stock which is the subject of taxation. The principle involved in the two cases is thus identical, only the phase of discrimination in the case at bar is stronger than in the case in 185 U. S., *supra*. There can be no doubt that the law protects citizens of a state from discrimination by the Legislature of the State of their resi-

dence, just as much as it protects citizens of other states from such discrimination.

The court, in the case in 185 U. S., then held that "apparently" there was an unjust discrimination between the tax on shares, when it was shown that one share was taxed for state purposes while the other was exempt, which is the case here. But the court went further and said that "this apparent discrimination" disappeared on a closer examination of the system, which exempted the non-resident from local municipal taxation and put such taxes altogether on the resident, and that though they might be unequal they were not necessarily so, and in fact might be to the advantage of the non-resident.

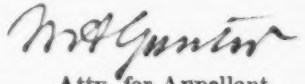
But in this case the law is necessarily unequal and discriminating. There is a tax on the share in foreign corporations for all state and county purposes, and there is no tax whatever on the share in domestic railroads having any property in the State.

The fact whether the railroads in which the shares are held have their property in one jurisdiction or another is a matter of no consequence, so far as the shares are concerned. The State, then, taxes the owner of shares in foreign railroads and exempts shares in domestic railroads and foreign roads paying some taxes to the State; that is, because a *third party* does or does not pay taxes to the State, citizens are to be discriminated against as to their own property.

That is to say, if A buys an annuity in a local corporation, and B buys one in a New York corporation, the State may tax the one and exempt the other, be-

cause the corporate property of the one company is situated in New York and the other in Alabama.

We thus think it is evident that the law in this case is utterly unconstitutional. And as the question involved is of great importance to the whole people of the United States, and no delay is asked in the collection by the State of the tax, the same having been already collected on execution, it is respectfully submiteed that a rehearing should be granted.



Atty. for Appellant.